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Contributions to International Law and World Order by the World Court's Adjudication of the Icelandic Fisheries Controversy

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Introduction

Natural resources are dwindling in a world of increasing population and advancing technology. One of the resources most vitally affected by this development has been that of the oceans; as the exploitation of this resource — particularly of fish — has become more efficient, the nations of the world have found themselves confronted with a genuine limitation on the World Ocean's ability to produce food for human consumption. To combat this trend, less developed coastal nations have sought to guarantee their vital harvests from the sea through the unilateral extension of exclusive fishing zones. Conflict has developed where one-sided expansion of interests affects the long-standing benefits enjoyed by other fishing states. Within this context is set the continuing fisheries zone disputes between the United Kingdom and the Federal Republic of Germany (West Germany), on one hand, and Iceland on the other.

The *Fisheries Jurisdiction Cases*[1], decided by the International Court of Justice in two separate opinions delivered on July 25, 1974, attempted to formulate a definitive answer to the resource allocation problem for these nations. The cases pose two broad questions which this article will endeavor to

[1] Fisheries Jurisdiction Case (United Kingdom v. Iceland) [1974] I.C.J. 3; Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland) [1974] I.C.J. 175.

answer in the light of recent law of the sea developments: 1) Are the judgments in these cases significant contributions to the development of international law relating to fisheries exploitation and conservation? and 2) How effective is the World Court in peacefully settling modern disputes of this nature?[2]

I. BACKGROUND TO FISHERIES JURISDICTION ISSUES

Within the twentieth century fishing technology has become extremely efficient. Fishing grounds may be depleted by the mechanized fleets of just a few countries within a few short years. And yet the ocean's resources are said to belong to all nations. In 1958 the United Nations, recognizing that conflicts regarding the proper allocation of marine resources could develop among nations, convened the first United Nations Conference on the Law of the Sea. The first conference along with two subsequent conferences provide background necessary to an understanding of the decisions in the *Fisheries Jurisdiction Cases.*

The International Law Commission, created after the founding of the United Nations in 1945, presented a number of proposals for codification of the law of the sea to the General Assembly in 1956. This report formed the basis for the Geneva Conference of the Law of the Sea in 1958. Upon delivering its findings, the Commission proposed adoption of a rule "that international law does not permit an extension of the territorial sea beyond twelve miles."[3]

Four conventions[4] were agreed upon at the 1958 Geneva Conference. However, the Convention on the Territorial Sea and the Contiguous Zone could not settle upon a uniform limit for

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[2] *Iceland's Regulations Establishing a Fishery Zone With a 50-Mile Limit Are Not Opposable to the United Kingdom and the Federal Republic of Germany,* 10 TEXAS INT'L L. J. 150, 158 (1975) [hereinafter cited as *Regulations*].

[3] Int'l L. Comm'n, Report, 11 U.N. GAOR, Supp. 9, at 3, U.N. Doc. A/3159 (1956).

[4] Convention on the Territorial Sea and the Contiguous Zone, Convention on the High Seas, Convention on Fishing and Conservation of the Living Resources of the High Seas, Convention on the Continental Shelf, U.N. Doc. A/Conf. 13/L. 52-55 (1958).

territorial waters. The old three-mile limit, established by the "cannonshot doctrine"[5] which limited territorial waters seaward the distance of the range of eighteenth century land-based guns, was supported by one-third of the participants. Several developing states, together with the Soviet Union, opted for a twelve-mile limit. The remainder supported a six-mile or greater limit. The Convention also prescribed a contiguous zone[6] which would extend no more than twelve miles. Since this contiguous zone would be adjacent to the state's territorial sea and would not extend beyond twelve miles seaward from the baseline of the territorial sea,[7] some authorities argue that, in effect, the Convention limited the territorial sea to the twelve-mile extension previously recommended by the International Law Commission.[8] The breadth of the contiguous zone could not be determined since no agreement had been reached on the interrelated breadth of the territorial sea. Nor was any accord forthcoming about exclusive fisheries zones.

The 1958 Conference advanced the law of the sea in several noteworthy categories. Article 1 of the Geneva Convention on the High Seas defined high seas as all parts of the sea not included in the internal waters or territorial sea of a state.[9]

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[5] Martens, *Evolution of Coastal State Jurisdiction: Conflict Between Developed and Developing Nations*, 5 ECOLOGY L. Q. 531, 532 (1976).

[6] The contiguous zone was defined in Article 24 of this Convention as a zone necessary for immigration and other regulations, but it was *not* the same as an exclusive fisheries zone (*Law of the Sea — Exclusive Economic Zone*, 16 HARV. INT'L. L. J. 474, 484 (1975) [hereinafter cited as *Exclusive Economic Zone*]). The confusion of terminology about contiguous zones, territorial waters, and exclusive fishery or economic zones increases the misunderstanding about coastal jurisdiction (Martens, *supra* note 5, at 538).

[7] Prior to the *Anglo-Norwegian Fisheries Case* in 1951 the baseline from which the territorial sea was measured had been the low-tide line of the coastal state. In deciding that Norway could uphold her decree of 1935 which drew her baseline from a number of rocks out at sea, visible only at low tide, the International Court of Justice redefined international law and extended the coastal's state's jurisdiction. Baselines are vital in determining fisheries zones (S. ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 144-145 (1962)).

[8] Martens, *supra* note 5, at 537; *see* the joint separate opinion of Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh, and Ruda in the Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland) [1974] I.C.J. at 218.

[9] [1974] I.C.J. 3, 22.

Article 2 stated that certain freedoms existed on the High Seas. "These freedoms [including fishing], and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas."[10] By Articles 1 and 2 of the Continental Shelf Convention the Conference agreed that the rights of a coastal state to its adjacent continental shelf relate solely to resources of its seabed and subsoil and that the waters themselves would legally be considered high seas.[11]

Preferential rights, a concept embodying particular fishing rights owed to a coastal state because of her special dependence upon coastal fisheries, was proposed by Iceland to the Convention on Fishing and Conservation of the Living Resources of the High Seas.[12] Iceland felt that, even if adequate conservation measures were to exist and catch limitations were imposed, the dependent coastal state still deserved individual consideration. This Convention, deriving its approach from President Truman's fishery Proclamation of September, 1945,[13] did pass a resolution which declared that a coastal state has an interest in the maintenance of the resources of the high seas beyond its territorial waters but does not have exclusive rights of jurisdiction outside of those waters. Negotiations between the coastal state and other interested parties would be the key to conservation of fish stocks.[14]

Because the 1958 Conference failed to reach agreement on either the limit of the territorial sea or on exclusive fisheries zones, a resolution was adopted requesting the General Assembly to study the advisability of convening a second Law of the Sea Conference to deal with these questions. During the interim, in January, 1959, fourteen states including Iceland and

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[10] [1974] I.C.J. 3, 56.

[11] [1974] I.C.J. 3, 108.

[12] Article 6 of this Convention is entitled "Resolutions on Special Situations Relating to Coastal Fisheries."

[13] Presidential Proclamation No. 2668, 59 STAT. 885 (1945). For an outline of the provisions of this proclamation *see* Martens, *supra* note 5, at 533.

[14] [1974] I.C.J. 3, 109 (Separate op. of Judge Waldock).

the United Kingdom met at the North East Atlantic Fisheries Convention. In March and April of 1960 the Second Law of the Sea Conference was held in Geneva.

At this Conference a joint Canadian-United States compromise proposal was made which provided for a six-mile territorial sea plus a further six-mile zone of exclusive fisheries, subject to a ten-year phase out period for nations fishing in that zone. This proposal lacked one vote of the two-thirds majority necessary for passage. Prior to this proposal a joint amendment concerning preferential rights, sponsored by Brazil, Cuba, and Uruguay, had been passed.

After a period of five years following the Geneva Conferences, nations again began asserting fishery jurisdiction claims. The South and Central American countries initiated two hundred mile zones, referring in part to President Truman's 1945 continental shelf Proclamation.[15] By June, 1972, after several conferences, essentially all Latin American states supported a two hundred mile economic (fisheries) zone which recognized the coastal state's rights over the renewable and non-renewable natural resources in the waters, the seabed, and the subsoil.[16]

Ambassador Arvid Pardo of Malta saw the problem of ocean exploration beyond the limits of national jurisdiction and proposed this area be considered the "common heritage of mankind" in a speech before the General Assembly in 1967. A moratorium resolution, opposed by the industrialized countries, was passed in December, 1969, and forbade the exploitation of the seabed. A year later the General Assembly passed the "Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction"[17] which provided the basis for the convocation of the Third Law of the Sea Conference. By this

[15] Presidential Proclamation No. 2667, 59 STAT. 884 (1945). This proclamation stated that the United States regards the natural resources of the subsoil and seabed of the continental shelf contiguous to the United States as appertaining to the United States. This would comprise an area under the so-called "high seas," and this proclamation did *not* include free-swimming species.

[16] Martens, *supra* note 5, at 540.

[17] G.A. Res. 2749, 25 U.N. GAOR Supp. 28, at 24, U.N. Doc. A/8028 (1970).

time, however, the common heritage consisted of much less of the World Ocean.

After an organizational session in December, 1973, the first substantive session was held in Caracas, beginning June 20, 1974. Efforts were directed toward creating a comprehensive Law of the Sea Treaty; a twelve-mile territorial sea and a two hundred-mile economic zone were agreed upon, subject to the resolution of some tangential issues[18] such as the outermost limit of jurisdiction over the continental shelf,[19] duties the coastal state would assume with respect to conservation of fish stocks, the legal status of the economic zone, and dispute settlement mechanisms.[20]

The second session, held at Geneva in 1975, provided for further compromises and demonstrated as well the increased influence of the developing nations working in concert. Expansion of coastal jurisdictions was supported even by landlocked states.

The third convention of this Conference, held in New York City in the early spring of 1976, attempted to draft a Law of the Sea Treaty to be adopted in the near future. Differences among developed and developing, maritime and landlocked, nations make a comprehensive treaty difficult to achieve in the light of recent increased state jurisdiction over the seas. This development plus other recent changes in international law which occurred through the Law of the Sea Conferences and contemporaneous political activity are vital to understanding the ramifications of the *Fishery Jurisdiction Cases.*

II. THE ICELANDIC FISHERIES CASES

Iceland, a less-developed coastal nation, has long sought to retain control over her fisheries. On April 5, 1948, ten years before the first Law of the Sea Conference, the Icelandic Parliament, the Althing, passed a law entitled "Law Concerning

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[18] Stevenson and Oxman, *The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session*, 69 AM. J. INT'L. L. 1, 2 (1975).

[19] *Id.* at 13.

[20] *Id.* at 17-18.

the Scientific Conservation of the Continental Shelf Fisheries" which gave authorization to its Ministry of Fisheries to regulate all fisheries in water above the Icelandic continental shelf — approximately fifty nautical miles in breadth. In 1952 Iceland, applying this authority, expanded its three-mile territorial sea by one mile; this exclusive fishing zone was further increased to twelve miles in 1958.[21]

In 1952 the United Kingdom protested the extension and the baselines from which it was drawn. Disagreement continued and British-Icelandic naval encounters within the disputed waters became known as the "Cod War". In 1958 both Great Britain and the Federal Republic of Germany protested Iceland's twelve-mile extension. Negotiations between these nations and Iceland were begun, and an agreement in the form of an Exchange of Notes was reached on March 11, 1961 (hereinafter referred to as the 1961 Exchange of Notes). Under the accord, Iceland could continue to work toward the implementation of its 1958 resolution for a twelve-mile zone and would give six months' notice before further extending the fisheries jurisdiction. The United Kingdom and the Federal Republic of Germany agreed to a three-year phase out period for fishing between a six-mile and twelve-mile limit, agreed not to fish in seven specified areas, but did not accept any Icelandic rights of jurisdiction outside the twelve-mile limit.[22] Included in the accord was a compromissary clause which provided that any dispute was to be referred to the International Court of Justice at the request of any of the parties.

This Exchange of Notes afforded satisfaction for ten years, but on July 14, 1971, Iceland provided her required six months' notice for termination of the agreements. She communicated to the British and German governments in February, 1972, that she found it necessary and reasonable to extend her zone of exclusive fisheries to include the sea covering the fifty-mile

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[21] One source said 1959 (Tiewul, *The Fisheries Jurisdiction Cases (1973) and the Ghost of Rebus Sic Stantibus*, 6 INT'L. L. & POL. 455 (1973)).

[22] [1974] I.C.J. 3, 113 (Separate op. of Judge Waldock).

continental shelf.[23] The fisheries limits would thus be extended as of September 1, 1972. Iceland also declared that the object and purpose of the Exchange of Notes had been accomplished; she considered the agreement terminated.[24] Further, Iceland claimed that the compromissary clause could not apply because the International Court of Justice lacked jurisdiction in the present circumstances. On July 14, 1972, the Althing issued regulations creating the fifty-mile fishing zone.

In referring the dispute to the International Court of Justice Great Britain and Germany contended 1) that Iceland's fifty-mile claim was invalid under international law, 2) that Iceland could not unilaterally extend her fisheries jurisdiction against the United Kingdom or Germany beyond the twelve-mile limit agreed upon in 1961, 3) that Iceland could not unilaterally impose restrictions on British and German fishing vessels beyond that limit, and 4) that each of the disputing countries was under mutual obligations to negotiate for a fisheries regime. Both nations included claims that Iceland had a duty to compensate them for interference with their fishing trawlers.

Iceland, conforming with her position that the Court lacked jurisdiction, did not participate in the proceedings. She did, however, further elaborate her jurisdictional argument to the Registrar of the International Court of Justice. The argument was based on the doctrine of *rebus sic stantibus*,[25] a doctrine which states that a treaty ceases to be in force if conditions upon which it was founded have changed. The alleged changed circumstances were 1) the extension of fishing zones to twelve miles by an increasing number of states, and 2) more efficient fishing techniques by the applicant states, thus threatening Iceland's livelihood.

Without accepting formal jurisdiction, the Court announced an interim order on August 17, 1972. This order set a limita-

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[23] Already by June of 1972 a 200-mile zone existed in essentially all of Latin America; *see discussion*, p. 179 *infra*.

[24] *Exclusive Economic Zone*, *supra* note 6, at 476.

[25] See Tiewul, *supra* note 21, at 455 for a fuller discussion of this term.

tion on the United Kingdom of a catch of no more than 170,000 metric tons per year within the "Sea Area of Iceland" and directed Iceland to refrain from enforcing its regulations against fishing vessels of the United Kingdom outside the twelve-mile zone.[26] A similar order, issued the same date, restricted Germany to a catch of 119,000 metric tons within the "Sea Area of Iceland".[27] Iceland replied on August 30, 1972, that she would not consider the interim order binding as the Court lacked jurisdiction in this case.

The decision to adjudicate was made on February 2, 1973, and was based upon the Court's assumption that the 1961 Exchange of Notes was a treaty still in force. Thus it found jurisdiction within Article 36, paragraph 1 of the Statute of the Court which defines the Court's jurisdiction as including "all cases which the parties refer to it and all matters specially provided for . . . in treaties or conventions in force."[28] The Court could also have based its jurisdiction on Article 36, paragraph 6 of its Statute[29] by which the Court has jurisdiction to decide on questions of its own jurisdiction. This approach, however, may have seemed overly circuitous once Iceland's contentions of a change of circumstances had been discarded as irrelevant. The Court held that the object and purpose (of the compromissary clause in the 1961 Exchange of Notes) "was . . . to provide a means whereby the parties might resolve the question of the validity of further claims."[30] In addition, the Court felt that if one party has already benefited from the executed provisions of a treaty it should be impermissible to allow that party to end obligations accepted under that treaty.[31] "Changed circumstances" would have to result in a "radical

[26] *Exclusive Economic Zone, supra* note 6, at 477.

[27] [1974] I.C.J. 175, 188.

[28] DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE 75 (S. ROSENNE, ed. 1974) [hereinafter cited as DOCUMENTS].

[29] Article 36, paragraph 6 of the Statute of the Court states: In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court. (DOCUMENTS, *supra* note 28, at 75-77).

[30] [1974] I.C.J. 3, 17.

[31] *Id.* at 18.

transformation of the extent of the obligations still to be performed" and here, they had not.[32]

Despite the Court's assumption of jurisdiction early in 1973, direct negotiations between the feuding parties continued. An "Interim Agreement in the Fisheries Dispute" for two years was signed between the United Kingdom and Iceland on November 13, 1973; no agreement was concluded although negotiations continued between Germany and Iceland.

A further jurisdictional issue was raised by this interim agreement between Great Britain and Iceland: the dispute between these parties might have been moot in the light of that November Exchange of Notes. After the conclusion of this agreement, the United Kingdom did withdraw her request for compensation from Iceland for interference with British trawlers.[33] The controversy remained alive, however, since the November Exchange of Notes was considered by both parties involved and by the Court to have been only an interim one, concluded without prejudice to the legal position or rights of either government. Thus the dispute would reemerge when the agreement terminated in November, 1975.[34] Additionally, the Court did not wish to discourage interim agreements which might promote peaceful settlements.[35] And the Court still had before it the case of *Germany v. Iceland* for which no interim agreement existed.

By a vote of ten justices to four, the International Court of Justice decided that Iceland's regulations were invalid against nationals of the United Kingdom and Germany. This decision was founded on the principle of opposability, which applied as a result of the terms of the 1961 Exchange of Notes. The essence of opposability is that one state seeks to invoke the terms of some convention or treaty (in this case, the 1961 Exchange of Notes), alleging that this convention or treaty should pre-

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[32] *Id.* at 21.

[33] *Id.* at 8.

[34] *Id.* at 19.

[35] *Id.* at 20.

vail over the principle or institution relied on by another state (here, the change of circumstances necessitating Iceland's extension of her fisheries zone).[36] Although the Court acknowledged that the terms of the 1961 Exchange of Notes should prevail over Iceland's claim of changed circumstances and invalidate the regulations extending Iceland's fisheries zone in this instance, it did not conclude that Iceland's regulations were invalid as applied to all other states under general international law.

The Court's use of the opposability principle flowed from two recent concepts of customary law[37] — the concept of the fishery zone, an area of exclusive fishery jurisdiction independent of the territorial sea, and the "concept of preferential rights of fishing in adjacent waters in favour of the coastal state, this preference operating in regard to other States concerned in the exploitation of the same fisheries".[38] Each opposing party had accepted these concepts either in the 1961 Exchange of Notes or in the applications to the Court.[39] Further, the 1958 Geneva Convention on the High Seas had incorporated in Articles I and II the principles of international law which provide that no state can validly claim sovereignty over any parts of the sea not included within its territorial waters.[40]

Elaborating on the parties' rights within the framework of opposability, the Court recognized that valid conflicting interests existed. Iceland, as the coastal state, had preferential rights due to economic necessity thus implying a certain priority; however, this priority could not extinguish the concurrent rights of other States, especially those such as the Applicant States whose fishing in the disputed waters had long been of impor-

[36] *Regulations, supra* note 2, at 152, note 10.

[37] There was some sentiment that the exclusive fishery zone was not customary — that is common, consistent and concordant — international law in 1974 ([1974] I.C.J. 3, 50 (Dissenting op. of Judge Ignacio-Pinto)). However, although a limit to this zone had not been determined, the concept of such a zone was commonly accepted.

[38] [1974] I.C.J. 3, 23; [1974] I.C.J. 175, 192.

[39] [1974] I.C.J. 3, 24; [1974] I.C.J. 175, 192-193.

[40] *Regulations, supra* note 2, at 156; *see* also discussion, p. 177, *infra*.

tance to their economies.[41] Thus Iceland's fifty-mile limit regulations were not valid to the extent that they conflicted with the recognized rights of the United Kingdom and Germany to fish in areas beyond the twelve-mile limit established in 1961.[42]

The Court further declared that mutually limiting rights in an area of the high seas implies mutual obligations.[43] The parties were therefore under mutual obligations to undertake good faith bilateral negotiations to aid in settling the dispute. These negotiations must be exercised with the preferential rights of Iceland and the rights of the United Kingdom and Germany considered and with due regard to the conservation and exploitation of the fisheries resources concerned. Secondly, all parties had a further obligation to continuously review the fisheries resources and to examine conservation and utilization techniques in the light of available scientific and other data.[44]

Finally, the Court further declared that Iceland could not unilaterally exclude or restrict vessels of the United Kingdom or Germany from fishing in areas between the twelve-mile and fifty-mile limits.[45] However, Germany's last submission that she should be compensated for Icelandic interference with her trawlers was not accepted because the submission was too abstract; the Court could not make an all-embracing finding of liability against Iceland.[46]

III. CONTRIBUTIONS OF THE *Fisheries Jurisdiction Cases* TO INTERNATIONAL LAW

The Court, in the *Fisheries Jurisdiction Cases,* did contribute to the development of international law by its treatment of the doctrines of the change of circumstances and of preferential rights, and by its concern with fisheries zones and management.

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[41] [1974] I.C.J. 3, 27-28; [1974] I.C.J. 175, 196.

[42] [1974] I.C.J. 3, 29; [1974] I.C.J. 175, 198.

[43] [1974] I.C.J. 3, 31; [1974] I.C.J. 175, 200.

[44] *Id.*

[45] [1974] I.C.J. 3, 30; [1974] I.C.J. 175, 200.

[46] [1974] I.C.J. 175, 205.

The doctrine of the fundamental change of circumstances was expressed in Article 62 of the Vienna Convention of the United Nations Conference on the Law of Treaties (1969):

> I. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
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> (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
>
> (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.[47]

This doctrine should be interpreted as an objective rule of law with no implied condition that the treaty should be terminated if certain events occur; the phrase, *"rebus sic stantibus"*, is not employed in Article 62 as this phrase had come to mean that the treaty would contain such an implied condition.[48] Emphasis is made on the restrictive nature of the doctrine; it should be applied only in exceptional cases. This strict approach thus operates to buttress the traditional notion that treaties must be honored in good faith.[49]

Article 62 speaks of "a fundamental change of circumstances which has occurred with regard to those existing at the time." Earlier drafts of this Article limited the change to facts alone; "circumstances" is more encompassing and was intended to include political, economic, legal, moral, and social changes as well.[50] In the case of Iceland, the change was alleged to be both political (the extension of fishing zones by many states to twelve miles) and economic (efficient fishing techniques of other states depleting Iceland's food supply). The International Court of Justice based its jurisdiction on the supposition that circum-

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[47] S. ROSENNE, LAW OF TREATIES, GUIDE TO LEGISLATIVE HISTORY OF VIENNA CONVENTION 324 (1970).

[48] Tiewul, *supra* note 21, at 462-463.

[49] *Id.* at 463-464.

[50] *Id.* at 464.

stances had not changed sufficiently to terminate the 1961 Exchange of Notes and its arbitration clause. But the Court also stated that "the alleged change of circumstances could not affect in the least the obligation to submit to its [the Court's] jurisdiction."[51] Thus the argument is self-serving and oblique; even if changes of circumstances had occurred they were apparently unimportant to the Court's reasoning.

The second prerequisite, that the changed circumstances had not been foreseen by the parties, does not seem to be evident. The interpretation of the fishing zone was in flux in 1961, but the twelve-mile zone compromise had nearly been adopted at the 1960 Law of the Sea Conference.[52] Although Iceland had bargained with the applicant states over a twelve-mile fisheries zone, she had indicated in the 1961 Exchange of Notes that this zone might be even further increased in the future.[53]

The third requirement is that the changed circumstances were those relied upon as the basis of consent to the treaty. The Court held that the circumstances upon which consent was based was that of providing a means for resolving the question of the validity of further claims.[54] This remedy for resolving the fisheries jurisdiction question — by submitting it to the Court — had not changed.

Lastly, the change must radically transform obligations still to be performed under the treaty to cause termination of the treaty. This stipulation the Court rejected handily:

> The present dispute is exactly of the character anticipated in the compromissary clause of the Exchange of Notes. Not only has the jurisdictional obligation not been radically transformed in its extent; it has remained precisely what it was in 1961.[55]

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[51] *Id.* at 465.

[52] *See* discussion, p. 179, *infra.*

[53] *See* discussion, p. 181, *infra.*

[54] *Exclusive Economic Zone, supra* note 6, at 457.

[55] [1974] I.C.J. 3, 21.

However, Iceland believed that the treaty itself was invalid;[56] thus obligations, such as jurisdiction by the International Court of Justice, would obviously have been radically transformed. The Court did not direct its argument to this issue.

Both Great Britain and Germany contended that the doctrine of changed circumstances does not allow an unchallengeable unilateral revocation of a treaty, as had been done by Iceland. Under this approach, the doctrine of changed circumstances is not one which operates automatically; it merely permits a party to call for termination and then to submit the question to a judicial body.[57] Such a procedure of recourse to the Court was already included within the 1961 Exchange of Notes.

Article 62 could be interpreted as calling for a unilateral termination or as calling for a judicial decision. The stronger argument, however, is that the Court will decide whether the treaty can be terminated.[58] The Court secures this right under Article 36, paragraph 1 of its statute;[59] it is the final arbiter of the dispute. Also, unilateral state action has never been a part of the doctrine,[60] and the United Nations Convention on the Law of Treaties in 1969 had set definite procedures, not compatible with unilateral action, for applying the doctrine of the fundamental change of circumstances.

Prior to the judgment it was suggested that the Court could contribute to the development of international law by clarifying the grounds for invalidating or terminating international agreements by attending to Iceland's contention about the change of circumstances.[61] The Court did precisely that when it stated that the circumstances had not changed sufficiently to invalidate the 1961 Exchange of Notes. This Exchange of Notes had

[56] Tiewul, *supra* note 21, at 469.

[57] *Id.* at 470.

[58] *Id.*

[59] Article 36, paragraph 1 of the Statute of the Court states: The jurisdiction of the Court comprises all cases which the Parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force. (DOCUMENTS, *supra* note 28, at 75).

[60] Tiewul, *supra* note 21, at 471.

[61] Katz, *Issues Arising in the Icelandic Fisheries Case*, 22 INT'L. & COMP. L. Q. 83, 108 (1973).

the force of a treaty, and its compromissary clause was an integral and still existent section of the agreement. Thus the International Court of Justice retained jurisdiction over the disputes.

By employing the doctrine of preferential rights rather than entering the legislative arena, the Court was able to approach a difficult question in a flexible way. The preferential rights concept had emerged at earlier Law of the Sea Conferences.[62] Essentially, three conditions are accepted as establishing preferential rights:

a) The claimant of a preferential right must be a coastal state.
b) The coastal state must be dependent upon fishing for its physical sustenance or economic well-being, and
c) The marine resources must be so depleted as to be unable to satisfy the demands of the coastal state and distant-water fishing states.[63]

In claiming preferential rights, however, due regard must be given to the interests of other states whose vessels fish in the same area. "Considerations similar to those which have prompted the recognition of the preferential rights of the coastal State in a special situation also apply when coastal populations in other fishing States are dependent on certain fishing grounds."[64] Germany and the United Kingdom do have traditional economic interests in the same fishing areas as Iceland; any resolution of this question requires an examination and balancing of the expressed interests of the three states.

The problem inherent in the concept of preferential rights is also its strongest point — that the substance of preferential rights must be developed through negotiation by the disputants themselves.[65] The judiciary could not be expected to apply the law relying on stable preferential rights. Sociological, economic, or political changes could occur within a matter of years,

[62] *See* discussion on the Law of the Sea Conferences, pp. 176-180, *infra*.
[63] [1974] I.C.J. 3, 25; [1974] I.C.J. 175, 193-194.
[64] [1974] I.C.J. 3, 29; [1974] I.C.J. 175, 197-198.
[65] [1974] I.C.J. 3, 25-26.

thus necessitating a complete redefinition of these rights.[66] But by employing the concept of preferential rights the Court could avoid prejudicing the upcoming Law of the Sea Conference while discussing the mutual interests involved in the dispute. Negotiation, especially in regard to conservation of the fisheries upon which each country depends, would lead to necessary compromises in this complex issue and not just impose a legal decision on fisheries jurisdiction limits.

As for exclusive fishery zones, the Court treated this concept as one of recent customary law as well. The fishery zone is a concept accepting national economic spheres of marine exploitation. However, such zones do not clearly define relationships in the context of an active dispute,[67] and there is little evidence that the fishery zone was, at that time, customary international law.[68]

The limit to the fisheries zone was discussed, and all members of the Court agreed to an exclusive twelve-mile zone. Disagreement arose, however, over the evolving notion of a greater limit, perhaps fifty miles as in this case or even up to two hundred miles. Several justices noted that between thirty and thirty-five states had already delimited economic fishery zones of more than twelve miles.[69] Most of the justices therefore preferred the middle stance — conceding that, while a twelve-mile zone might not be an outer limit, to approve any greater zone would be an invalid exercise in judicial legislation.[70] Thus the resulting decision discussed these specific disputes and not a general fisheries zone limitation. It was left to the upcoming Convention on the Law of the Seas to define a broader general limit.

In examining the fishing zone problem, the Court chose to refer to the Geneva Convention on the High Seas (1958). By

[66] *Exclusive Economic Zone, supra* note 6, at 483.

[67] *Regulations, supra* note 2, at 167.

[68] One justice, in his dissent, argues that the fishery zone had not yet been defined in international law, thus Iceland could not be criticized for extending it! ([1974] I.C.J. 3, 151 (Dissenting op. of Judge Petrén)).

[69] *Exclusive Economic Zone, supra* note 6, at 487.

[70] *Id.* at 488.

that Convention a state is forbidden from unilaterally extending its exclusive fisheries jurisdiction beyond its territorial seas into the high seas.[71] But the Convention does not adequately distinguish the boundary line between high seas and exclusive economic zones; the concept of exclusive fisheries zones was not negotiated. The Court was relying upon a definition which was probably inoperative in the light of the modern trend of exclusive fishery zones.[72]

Prior to the judgments, proposals were made regarding the establishment of fishery zone limits through this litigation. A decision on limits of these zones just before the convening of the Conference on the Law of the Sea could lessen agreement among participating nations. The absence of any judicial pronouncement on the subject would contribute to the uncertainty of the law in this area, and this might induce participation at the upcoming Conference, since all interests could yet be explored.[73] Although there was little likelihood at the time that a definitive treaty on fisheries jurisdiction would be forthcoming at the Conference,[74] a decision on whether Iceland's fifty-mile fisheries limit was valid under international law *erga omnes* was the Court's primary function in settling the dispute.[75] By deciding that Iceland's regulations were not opposable to Germany or the United Kingdom and declining discussion of the claim that Iceland's action was invalid against the world, the Court formulated a conservative opinion. Perhaps it was best for "the Court to retreat from the arena rather than to enter and lose by engaging in legislative behavior for which it is ill-suited."[76]

In summary, the long-term implications of the *Fisheries Jurisdiction Cases* may be limited. The Court did contribute to developing law by further clarifying the doctrine of the funda-

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[71] *See* discussion, p. 177, *infra*.

[72] *Exclusive Economic Zone*, *supra* note 6, at 484.

[73] Katz, *supra* note 61, at 108.

[74] *Regulations*, *supra* note 2, at 169.

[75] *Id.* at 170.

[76] *Exclusive Economic Zone*, *supra* note 6, at 487.

mental change of circumstances. However, this doctrine has been continually rejected in international forums, even in cases such as these where it might merit some emphasis.[77]

By prescribing negotiations which would balance the preferential rights of Iceland with the historical fishing rights of Great Britain and Germany, the Court influences the course of such negotiations. These negotiations, frequently weighted toward powerful nations, must be directed according to principles of equity.[78] Although the Court did elaborate on preferential rights, this concept may not endure since coastal states are broadening their exclusive fisheries zones.

The developing concept of the fishery zone was essentially left to the discretion of the upcoming United Nations Law of the Sea Conference and other future forums. In flux, formation, and reformation, international law requires the exacting definition and global applicability which can only be supplied by international legislative agencies.[79] "Since any extension of coastal state jurisdiction deprives other states of the benefit of certain rights within the high seas, every such claim needs a basis in international law."[80] Because it did not attempt to delineate a fishery zone, the Court may find its decisions in these cases will serve as a more enduring, albeit weak, contribution to evolving international law.

IV. THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE IN SIMILAR DISPUTES

What is and will be the role of the International Court of Justice in the peaceful settlement of disputes of this nature? It is suggested that the Court's function is expanding beyond the strictly judicial realm — to promoting and guiding settlements in a broader political context. This expanded function is manifested by the Court's opinion in the *Fisheries Jurisdiction Cases*; here, it addressed issues of conservation and of

[77] Tiewul, *supra* note 21, at 472.

[78] *Exclusive Economic Zone, supra* note 6, at 490.

[79] *Id.*

[80] Martens, *supra* note 5, at 552.

preferential rights and affirmed the duty to negotiate under formal guidelines.[81] However closely intertwined, preferential rights and conservation of fish stocks may not be the same issues as fisheries jurisdictions,[82] but they had been considered adjuncts to the 1961 Exchange of Notes and the British-Icelandic interim agreement. The Court felt it had to consider "all relevant elements in administering justice between the Parties."[83] The danger is, of course, that the Court will enter too much upon the duties of international legislative bodies, such as the General Assembly, and not be able to render a depoliticized application of international law.

Neither is total restraint from legislative considerations a viable option for the Court. In the *Fisheries Jurisdiction Cases,* issues which require multilateral settlement among all states who fish off Iceland's coast were limited to only bilateral treatment.[84] Ignoring the applicant states' first claim that Iceland's fifty-mile extension was illegal does not foster the world's trust in the Court for the resolution of future disputes.[85]

That the International Court of Justice may not be adequate to settle fisheries jurisdiction disputes is reflected in several ways. The interim agreement between the United Kingdom and Iceland in 1973 indicates, to some degree, that the parties lacked faith in the Court's ability to settle the dispute.[86] Perhaps the disputants believed an answer would be forthcoming at the Law of the Sea Conference. A working group at the Caracas session of the Conference indicated the need for the establishment of a Law of the Sea Tribunal to entertain claims from individual persons and to have jurisdiction over contentious cases between a state and an international organization; The International Court of Justice, under Article 34, paragraph 1 of its Statute,[87]

[81] *Regulations, supra* note 2, at 162-163.

[82] [1974] I.C.J. 3, 144 (Dissenting op. of Judge Gros).

[83] [1974] I.C.J. 175, 190.

[84] *Regulations, supra* note 2, at 164-165; in fact, eleven nations appear to fish off the coast of Iceland ([1974] I.C.J. 3, 137 (Dissenting op. of Judge Gros)).

[85] *Exclusive Economic Zone, supra* note 6, at 486.

[86] *Regulations, supra* note 2, at 170.

[87] Article 34, paragraph 1 of the Statute of the Court states: Only states may be Parties in cases before the Court. (DOCUMENTS, *supra* note 28, at 75).

has jurisdiction only over disputes between two or more states. In addition, many of the developing nations — significantly those likely to be involved in a fisheries dispute — have been discontented with some decisions rendered by the Court as well as with its compulsory jurisdiction in disputes. They might be more willing to accept the jurisdiction of a new tribunal established to protect the rights and interests of all states in matters relating to the sea, especially if they were to participate in its formation.[88]

V. CONCLUSION

The fisheries issues are complex and everchanging. States increasingly believe that they may extend their claims further seaward, possibly including a continental shelf of up to six hundred miles, absent international law directly opposing such action.[89] Even after the third United Nations Conference on the Law of the Sea many issues were left unresolved, although there was broad agreement on the creation of the two hundred-mile economic zone.[90]

Essentially the world is looking toward reasonable and effective utilization of the World Ocean's biological resources. Decisions relating to fisheries should thus be based on substantial scientific data. Some data, revealing the interdependence of species, indicate that perhaps the two hundred-mile fisheries zone itself will weaken and not protect the living resources of the ocean.[91] Many different theories have been and will continue to be proposed both to conserve and to apportion fairly these vital food resources.

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[88] Adede, *Settlement of Disputes Arising Under the Law of the Sea Convention*, 69 AM. J. INT'L. L. 798, 817 note 29 (October, 1975).

[89] Martens, *supra* note 5, at 551.

[90] The United States just put its 200-mile fisheries zone into effect on March 1, 1977; Iceland's fishery zone was extended to 200 miles on October 15, 1975 (Martens, *supra* note 5, at 552, note 143). *See* Taft, *The Third U.N. Law of the Sea Conference: Major Unresolved Fisheries Issues*, 14 COLUM. J. TRANSNAT'L. L. 112-117 (1975), for a discussion of issues unresolved at the Conference.

[91] Moiseev, *Some Biological Background for International Legal Acts on Rational Utilization of the Living Resources of the World Ocean*, 6 GA. J. INT'L. & COMP. L. 143, 144 (1976).

With so much difference of opinion as to how international agreements should approach the fisheries issue and as to how the International Court of Justice should respond to fisheries disputes,[92] the Court's action deserves some credit along with criticism. Serious problems arise for adjudication in such situations of rapidly changing value systems, since justice is based upon a fair interpretation of the law.[93] The Court must depend upon voluntary jurisdiction and voluntary compliance with the law; thus in the *Fisheries Jurisdiction Cases* the Court retreated from issues which it felt should be decided within the political context of international legislative bodies, while coincidentally suggesting solutions — a delicate balance indeed. In order to attain compliance with its pronouncements the Court emphasized the necessity for fair negotiations to promote *mutual* benefits — perhaps seeing equitable dealing as the basis for enduring compromise.

The problem of impartial allocation of the world's fisheries is a continuing one. In the *Fisheries Jurisdiction Cases* an argument can be made that the International Court of Justice may not have shown fairness to Iceland regarding her jurisdictional dispute — that the circumstances indeed had changed fundamentally. But by deciding the invalidity of Iceland's unilateral claim with regard to the United Kingdom and the Federal Republic of Germany, the Court provides a sufficient basis for subsequent political settlement of the parties' disagreements[94] while at the same time allowing latitude for upcoming international legislative conferences to establish limits to fisheries zones. Cooperation and decision-making by all-nation participation serves self interests and thus world order better, perhaps, than would an arbitrary decision of the Court.

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[92] *See* Katz, *supra* note 61, for an analysis of possible approaches the Court might have taken.

[93] Falk, *Realistic Horizons for International Adjudication*, 11 VA. J. INT'L. L. 314, 319 (1971).

[94] *Regulations*, *supra* note 2, at 171.